IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

PHILIP H. SIMON,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

Brief in Support of Petition for Certiorari.

Jurisdiction.

The jurisdiction of this Court is invoked under provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Section 347(a)).

Statement of the Case.

The facts have been set forth forth in the foregoing petition.

SUMMARY OF ARGUMENT.

POINT I.

It was prejudicial error for prosecuting attorney, in endeavoring to impeach a character witness, to suggest

and impute existence of prior charges of crimes and arrests of the defendant and to ask if the witness "knew" of them.

POINT II.

In a criminal case, the United States Circuit Court of Appeals has the power to review errors committed in the trial court, even though not reserved by objection, exception, or motion for mistrial.

ARGUMENT.

POINT I.

It was prejudicial error for prosecuting attorney, in endeavoring to impeach a character witness, to suggest and impute existence of prior charges of crimes and arrests of the defendant and to ask if the witness "knew" of them.

Assuming *arguendo,* that Dr. Gerber had been duly qualified as a character witness by the defendant who called him, the matters disclosed by the questions asked him on cross-examination by the prosecuting attorney in seeking to impeach him, were improper, highly prejudicial, deprived defendant of a fair trial and constituted reversible error.

The first improper question on cross-examination was:

> "*Do you know* whether or not he (defendant) had any previous police or criminal record in his community?" (R. 36)

This question assumes the existence of a previous police or criminal record of the defendant as a fact, although there is no such factual evidence in the entire record. The question would have been proper had it been addressed rather to the defendant's *reputation* in the community, and phrased, thus:

> "*Have you heard* that the defendant has a previous police or criminal record?"

In *Stewart* v. *United States,* 104 F. (2d) 234 (App. D. C., 1939), the Court said:

> "Since, however, the question of the extent of cross-examination of character witnesses so frequently arises in this jurisdiction, we deem it not improper to state more definitely, perhaps, than has been done before what we believe to be the correct rule in relation thereto. The same rule which excludes independent evidence of the former criminal record of an accused confines character evidence to his general reputation. When evidence of good character is offered, cross-examination of the character witness has a legitimate purpose in testing the grounds of his belief and, since the only admissible evidence of good character is what people generally, who know the accused, think about him, the prosecuting attorney may ask if the witness has heard of conduct negativing a favorable reputation. For the word 'character' in this sense means reputation as distinguished from disposition. By this token, the witness' knowledge of particular acts is not admissible to approve character. Consequently the witness should not be asked, either upon direct or cross-examination, if he knows of particular incidents in the career of the accused. In other words, the witness on cross-examination should be asked only—'Have you heard?'—not—'Do you know?'"

See also:

Filippelli v. *U. S.*, 6 F. (2d) 121 (C. C. A. 9th, 1925).

In the *Filippelli* case, *supra,* the prosecuting attorney asked:

> "If you had heard he had been arrested frequently * * * you would not think his reputation was good?"

The Court condemned this question because it assumed that the plaintiff in error had been arrested a number of times. The court said:

> "If such were the fact, it was misconduct to call the matter to the attention of the jury, because the Government would not be permitted to prove it, and if such were not the fact, the misconduct was graver still."

See also:

Spalitto v. *U. S.*, 39 F. (2d) 782 (C. C. A. 8th, 1930);

Sloan v. *U. S.*, 31 F. (2d) 902, 905, 906 (C. C. A. 8th, 1929).

As stated by Wigmore on Evidence, 3rd Edition, Section 988, at page 618:

> "On this principle, then, it is proper to probe the asserted reputation by learning whether such rumors have come to the witness' knowledge; for if they have, it is apparent that the alleged reputation is more or less a fabrication of his mind.
>
> "It is to be noted that the injury is always directed to the witness' knowledge of the disparaging rumor

> as negativing the reputation. There must be no question as to the fact of the misconduct, or the rule against particular facts would be violated; and it is this distinction that the Courts are constantly obliged to enforce."

The serious objection, then, to the type of question asked in the instant case is that this method of inquiry or cross examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; counsel rely upon the mere putting of the question, not caring that it is answered negatively, to convey their covert insinuation.

The next improper and prejudicial question asked the witness by the prosecuting attorney on cross examination was:

> "Doctor, would you be surprised to learn that he (defendant) was charged in 1933 with the crime of conspiracy, and that he (defendant) was charged in 1934 with having performed an abortion?" (R. 36)

The purpose of the foregoing question is, not to endeavor to impeach the witness, but to show in an indirect way, that the defendant was previously charged with the crimes of conspiracy and abortion. What other purpose could this question have served? What other purpose could the prosecuting attorney have had in mind in asking it? He was not interested to learn whether or not such knowledge would or would not surprise the witness. The surprise of the witness was of no legal importance. Naturally, the jury would infer from the question that such charges of crime had been made against the defendant.

When confronted by a similar question, the Circuit Court of Appeals, Fourth Circuit (1932), in *Newman* v. *United States,* 289 Fed. 712, 717, said:

> "Nor can it be seriously doubted that what occurred in reference to abortions and dispensing of drugs generally, regardless of the court's action in striking out such evidence, did not likewise prejudicially affect the jury in their consideration of the case properly against the accused, * * *"

See also:

Glover v. *U. S.,* 147 Fed. 426, 429, 430 (C. C. A. 8th, 1906);
Coyne v. *U. S.,* 246 Fed. 120 (C. C. A. 5th, 1917);
Weiner v. *U. S.,* 20 F. (2d) 522 (C. C. A. 3rd, 1927);
Coulston v. *U. S.,* 51 F. (2d) 178, 181, 182 (C. C. A. 10th, 1931).

As appears above, other Circuit Courts of Appeal have recognized the vice of both of these types of question and strictly limited such questions to the one form "Did you hear" or "Have you heard" of such misconduct or acts. The Circuit Court of Appeals, Third Circuit, condoned as proper in the instant case, questions repeatedly attacked as improper by said other Circuit Courts of Appeals.

The Circuit Court of Appeals, Third Circuit, stands alone in failing to grant to defendants in criminal cases the protection due them and accorded them by the other Circuit Courts of Appeals.

See:

Pittman v. *U. S.*, 42 F. (2d) 793 (C. C. A. 8th, 1930);
Fabacher v. *U. S.*, 20 F. (2d) 736 (C. C. A. 5th, 1927);
Skuy v. *U. S.*, 261 Fed. 316 (C. C. A. 8th, 1919);
Bonbarger v. *U. S.*, 219 Fed. 841 (C. C. A. 5th, 1914);
State v. *Young*, 93 N. J. L. 396;
State v. *Bossone*, 89 N. J. L. 724, affirming 88 N. J. Law 45;
State v. *Quinlan*, 86 N. J. L. 120, aff. 87 N. J. L. 333;
Coulston v. *U. S.*, 51 F. (2d) 178 (C. C. A. 10th, 1931).

This conflict never has been, but should be dissipated by a decision of the Supreme Court.

POINT II.

In a criminal case, the United States Circuit Court of Appeals has the power and duty to review errors in the trial court, even though not reserved by objection, exception, or motion for mistrial.

In its opinion in the instant case, the Circuit Court of Appeals, Third Circuit, stated that:

> "It will be noted that the attorney for the defendant did not ask for the withdrawal of a juror and for the declaration of a mistrial and indeed did not even request that the court instruct the jury to disregard

> the question asked of Dr. Gerber as to whether or not he would be surprised to learn that the defendant had been charged with other crimes." (R. 37)

and further,

> "Moreover, as we have indicated, counsel for the defendant, beyond making an objection to the question, did nothing." (R. 38).

Its decision is thus based upon an interpretation of the law which is in conflict with decisions of this Court, other Circuit Courts of Appeals, and its own previous decisions.

It is a cardinal principle that it is the duty of the Courts and of the District Attorney to protect the innocent charged with crime, as well as to prosecute the guilty.

See

Read v. *United States,* 42 F. (2d) 636, 645 (C. C. A. 8th, 1930);
Taliaferro v. *United States,* 47 F. (2d) 699, 702 (C. C. A. 9th, 1931).

The failure of defendant's counsel to object, except, or to move for a mistrial, in the instant situation, does not deprive such defendant of his right to have these matters excluded from the jury so that defendant might have a fair and impartial trial. This is the least that must be done by the Court (*Waldron* v. *Waldron,* 156 U. S. 361 (1895)); though it is submitted that the mere asking of these questions was so highly prejudicial that even such a clear direction could not have cured the error.

Mercer v. *United States,* 14 F. (2d) 281 (C. C. A. 3rd, 1926);
Waldron v. *Waldron,* 156 U. S. 361 (1895);
Throckmorton v. *Holt,* 180 U. S. 552 (1900);
Lockhard v. *U. S.,* 35 F. (2d) 905 (C. C. A. 9th, 1929);
Holt v. *U. S.,* 94 F. (2d) 90, 94 (C. C. A. 10th, 1937);
McAffee v. *U. S.,* 105 F. (2d) 21 (App. D. C., 1939).

Nor is the defendant in a criminal case to be deprived of the right of review of such prejudicial errors in a trial Court even though objection, exception, request for a mistrial or request for an instruction to the jury is not made by his counsel.

Clyatt v. *United States,* 197 U. S. 207 (1905);
Crawford v. *United States,* 212 U. S. 183 (1909);
Weems v. *United States,* 217 U. S. 349, 362 (1910);
Brasfield, et al. v. *United States,* 272 U. S. 448, 450 (1926);
Savage v. *United States,* 213 Fed. 31, 32 (C. C. A. 8th, 1914);
DeJianne v. *United States,* 282 Fed. 737, 739 (C. C. A. 3rd, 1922);
Thompson v. *United States,* 283 Fed. 895, 896 (C. C. A. 3rd, 1922);
Ayres v. *United States,* 58 F. (2d) 607, 609 (C. C. A. 8th, 1932);
Tobin v. *United States,* 93 F. (2d) 861 (C. C. A. 10th, 1938);

Crabb, et al. v. *United States,* 99 F. (2d) 325, 326 (C. C. A. 10th, 1938);
Smith v. *United States,* 106 F. (2d) 726, 727 (C. C. A. 4th, 1939).

In the above respects, the decision of the Circuit Court of Appeals, Third Circuit in the instant case should be made to conform with the decisions of this Court, the other Circuit Courts of Appeals, and its own Court.

Conclusion.

It is respectfully submitted that the questions involved in this application are of sufficient importance to require an exercise of this Court's supervisory jurisdiction by writ of certiorari.

Respectfully submitted,

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